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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

McKinsey & Company, Inc. United States
711 3rd Avenue
4th Floor
New York, NY 10017

Plaintiff,

v.

U.S. Department of Homeland Security
Office of the General Counsel
245 Murray Lane SW
Mail Stop 0485
Washington, DC 20528-0485

U.S. Citizenship and Immigration Services
111 Massachusetts Ave. N.W.
Washington, DC 20529-2000

USCIS California Service Center
24000 Avila Rd.
Laguna Niguel, CA 92677

Defendants.

Civil No. 1:19-cv-86

COMPLAINT FOR DECLARATORY AND MANDAMUS RELIEF

INTRODUCTION

1. This case concerns an unreasonable delay in approval of an H-1B visa petition for an employee, Aashay Kirit Shah ("Mr. Shah"), of Plaintiff McKinsey & Company, Inc. United States ("McKinsey").

2. Plaintiff began taking steps to sponsor Mr. Shah for an H-1B in April 2017. An adjudicator in the California Service Center ("CSC") of Defendant U.S. Citizenship and Immigration Services ("USCIS") initially denied Plaintiff's visa petition in November 2017.

3. On July 23, 2018, USCIS's internal appellate body, the Administrative Appeals Office (AAO), reversed that earlier denial, concluded that Plaintiff had met its burden, and remanded the matter back to CSC.

4. On August 16, 2018, CSC reopened the H-1B petition. Since that time, CSC has taken no further action.

5. Nearly six months have now passed since the appellate reversal (and almost two years since Plaintiff's initial filing), with no word concerning when or whether CSC will grant the petition—a "Form I-129"—as required by the AAO opinion.

6. Time is now running out. Mr. Shah may lawfully work for Plaintiff through only February 14, 2019. Without the H-1B petition approval, Plaintiff will be forced to terminate the employment of Mr. Shah, and Mr. Shah will shortly thereafter be forced either to depart the United States or to begin accruing unlawful presence in the United States, which could result in a years-long bar from entering the country.

7. There is no substantive question concerning *whether* Plaintiff's visa petition should be granted. USCIS's appellate body settled that question definitively in Plaintiff's favor. CSC thus has no legal basis for raising additional concerns that overrule the AAO's settled decision.

8. The only legally permissible course is for CSC to grant the Plaintiff's petition, per the AAO's order. This duty is ministerial in nature and could be accomplished immediately.

9. Despite CSC having no basis to continue withholding petition approval, CSC has taken no substantive action in this matter since July 2018 and no action at all since its pro forma reopening of the petition in August 2018. That delay has persisted despite efforts to inquire into the case's status and prompt a decision.

10. Because of the pending expiration of its employee's status, Plaintiff must, regrettably, seek this Court's assistance in compelling Defendants to perform the duty that they owe to Plaintiff—approval of Plaintiff's visa petition—before Mr. Shah loses his employment authorization.

11. Should action not be forthcoming from the government by February 14, 2019, Plaintiff will be forced to seek interim action to preserve the status quo, including an order from this court preventing his OPT status from lapsing or otherwise ensuring that Mr. Shah does not accrue unlawful presence during any period before approval of Plaintiff's H-1B petition.

12. Plaintiff thus respectfully requests that this Court:

(i) preserve the status quo by requiring the government to permit Mr. Shah to continue working and preventing Mr. Shah from accruing unlawful presence until the H-1B petition approval is granted;

(ii) declare that Plaintiff is entitled to approval of its Form I-129 and that Defendants have unlawfully delayed issuing that approval;

(iii) hold that USCIS has unduly delayed its adjudication of Plaintiff's Form I-129; and

(iv) compel USCIS to approve Plaintiff's Form I-129 immediately.

PARTIES

13. Plaintiff McKinsey & Company, Inc. United States is a New York corporation with its principal place of business in New York, New York.

14. Defendant U.S. Department of Homeland Security is a federal agency bearing relevant responsibility for administration and enforcement of the nation's immigration laws.

15. Defendant U.S. Citizenship and Immigration Services (USCIS), a bureau of the U.S. Department of Homeland Security, is responsible for adjudicating visa petitions, including Plaintiff's petition.

16. Defendant California Service Center is a component of Defendant USCIS and is, on information and belief, the component of USCIS currently responsible for the timely adjudication and approval of Plaintiff's H-1B petition.

JURISDICTION AND VENUE

17. The Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (except where statutes preclude review, 28 U.S.C. § 1331 "confer[s] jurisdiction on federal courts to review agency action"). See also, 5 U.S.C. § 702; 28 U.S.C. § 1361; 28 U.S.C. §§ 2201–2202.

18. Because Defendants' decision on a petition for H-1B visa status is not discretionary, neither the immigration laws (*see, e.g.,* 8 U.S.C. § 1252(a)(2)(B)(ii)) nor the APA withdraws jurisdiction. See, e.g., *Spencer Enterprises, Inc. et al v. United States*, 345 F.3d 683 (9th Cir. 2003).

19. The aid of the Court is invoked under 28 U.S.C. §§ 2201 and 2202, authorizing declaratory judgment.

20. Venue properly lies in this judicial district under 28 U.S.C. § 1391(e), in that Defendants are agencies and individuals within the federal Executive Branch, including federal government agencies and components thereof and officers of federal government agencies. As such, Defendants reside in this judicial district. *See* Wright, Miller, & Cooper; Federal Practice and Procedure; Jurisdiction 3d § 3815 ("Under Section 1391(e)(1) a suit may be brought in any district in which a defendant in the action resides. It is well-settled that the official residence of the agency, officer, or employee, rather than the personal residence of the individual being sued, will continue to control in applying this provision.") (citing, *e.g.*, *Williams v. U.S.*, No. 01-0024, 2001 WL 1352885, at *1 (N.D. Cal. Oct. 23, 2001) ("For purposes of venue, all federal defendants reside in Washington, D.C.")).

FACTS

21. Plaintiff McKinsey & Company, Inc. United States is the U.S. operating subsidiary of McKinsey & Company, Inc, a U.S. corporation which, along with its branches and subsidiaries worldwide, is a global management consulting firm that serves a broad mix of private, public, and social sector institutions. Plaintiff is headquartered in New York City.

22. Since December 2016, Plaintiff has employed Aashay Kirit Shah as an Associate (Management Consultant) in Plaintiff's Minneapolis, Minnesota office. Mr. Shah works in Plaintiff's healthcare systems, pharmaceuticals, and medical products practice group.

23. Mr. Shah is a graduate of the University of Iowa, from which he received a Ph.D in Pharmacy in December 2015.

24. Mr. Shah currently resides temporarily in the United States in F-1 visa status. F-1 visa status permits aliens to attend a course of study leading to an academic degree at a U.S. college or university.

25. F-1 status generally does not permit an alien to work while in the United States. Pursuant to the long-established "Optional Practical Training" (OPT) program, however, students are permitted to continue residing in the United States for a certain period of time *after* completion of their academic degree program and to pursue practical, on-the-job training in their field of study. The alien's course of study drives the amount of OPT time that he or she receives.

26. Since December 2016, Plaintiff has employed Mr. Shah pursuant to OPT. Mr. Shah's OPT status is now, however, set to expire on February 14, 2019.

27. If Mr. Shah does not obtain a different lawful status that permits employment by that date, Plaintiff will no longer be permitted to employ him in the United States.

28. Furthermore, if Mr. Shah remains in the United States for more than 60 days after his OPT expires, he will be subject to removal and to the potential that he will be barred from the United States for up to ten years.

29. In effect, if Mr. Shah cannot obtain lawful status by February 14, 2019, he will lose his job and, in short order, his ability to remain in the United States.

Plaintiff Files for an H-1B Visa

30. Because Plaintiff wishes to retain Mr. Shah on a full-time, continuing basis, Plaintiff began the process of sponsoring Mr. Shah for another lawful non-immigrant visa status in April 2017.

31. On April 3, 2017, Plaintiff filed a Form I-129 to seek H-1B visa status for Mr. Shah. The Agency number for that filing is WAC-17-146-53090.

32. H-1B visa status is available for individuals who will be working in the United States in a "specialty occupation." Many positions requiring a Bachelor of Arts degree or greater qualify

for H-1B designation. H-1B visas are, however, numerically limited such that they are oversubscribed and subject to a lottery system each year.

33. Plaintiff's I-129 for Mr. Shah was selected for further processing in that lottery system on April 11, 2017. UCSIS's California Service Center (CSC) at that point took over the adjudication of Plaintiff's I-129.

34. The CSC denied Plaintiff's I-129 on November 27, 2017. The CSC adjudicator found that Plaintiff had failed to qualify for the H-1B visa for a variety of reasons including, *inter alia*, that the proffered position did not qualify as a specialty occupation position.

35. On December 15, 2017, Plaintiff appealed that CSC denial decision to the Administrative Appeals Office (AAO), the appropriate appellate body within USCIS. The Agency number for that filing is WAC-18-900-87010.

36. On July 23, 2018, the AAO reversed the CSC's denial of Plaintiff's petition. In a terse opinion, the AAO held that, contrary to the CSC's denial, Plaintiff had "established that the proffered position qualifies for classification as a specialty occupation" as defined in the relevant statutory and regulatory provisions.

37. The AAO thus "sustained" Plaintiff's appeal and, on information and belief, remanded the matter to CSC. The AAO's opinion and CSC's pro forma reopening of Plaintiff's petition are attached hereto as Exhibit A.

CSC Unlawfully Delays Its Ministerial Actions

38. Despite the language in the AAO's opinion requiring CSC to approve Plaintiff's petition, CSC has continuously refused to do so for nearly six months. CSC's behavior defies explanation.

39. CSC has no lawful basis for its failure to grant Plaintiff's visa petition. The AAO has overruled the substantive legal bases that CSC first asserted in denying the petition. The relevant regulations give CSC no grounds to assert additional bases for a denial.

40. CSC has no procedural basis for its delay. The government has no available appeal or other remedy for an adverse AAO decision. By law, CSC must now grant the petition as the AAO has required.

41. The relevant regulations give CSC no basis to substantively reopen the matter. The CSC's role now only requires reopening the proceeding to grant the visa petition at issue.

42. The AAO's publicly available practice manual makes the ministerial nature of CSC's role clear. That manual is available at https://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/Practice%20Manual/AAO_DHS_Precedent_Decision_Process_Print_Version.pdf

43. The AAO manual states at Section 3.14(a) that, after the AAO has sustained an appeal, "the office that made the underlying unfavorable decision is responsible for issuing any documents relating to the approved benefit request[.]"

44. Because the AAO has sustained Plaintiff's appeal here, CSC must simply issue the requisite approval notice. That ministerial task has now been unduly delayed for nearly six months.

EXHAUSTION

45. Plaintiff has exhausted all available administrative remedies.

46. Plaintiff sought appeal of the adverse CSC decision before the AAO and won its case.

47. Plaintiff has no remedy to compel CSC to grant the petition, as the AAO has required. Plaintiff's attempts to reach out to CSC informally have failed.

48. Plaintiff has attempted to reach out to CSC to prompt a decision. On December 10, 2018, Plaintiff's counsel sent an email to CSC's "premium processing" unit at the CSC-Premium.Processing@uscis.dhs.gov email address. (Plaintiff had paid a "premium processing" fee to seek a prompt adjudication of its petition.)

49. That same day, "Officer Rich" responded to Plaintiff's email stating that he had forwarded the inquiry to the adjudicating officer and supervisor over the case.

50. Having heard nothing, Plaintiff's counsel again reached out to the same email address on January 11, 2019 explaining that time was of the essence because Mr. Shah's STEM OPT employment authorization was about to expire.

51. That same day, "Officer Rich" again stated that he had "reached out to the Adjudicating Officers [SIC] supervisor" and that he would "follow up with an additional email" once he had received information from that supervisor.

52. No further responses have been forthcoming, and Plaintiff has no other avenues to prompt action by the CSC.

53. As such, Plaintiff has exhausted its administrative remedies.

INJURY

54. Plaintiff is entitled to the prompt adjudication of its H-1B petition. Defendants have failed to adjudicate that petition promptly, first by denying the petition without substantive basis and now by refusing to enforce the AAO's mandate that the petition be granted.

55. If Plaintiff cannot obtain approval of its H-1B petition in the near future, it will lose a valuable employee and will experience harm to its business.

56. Mr. Shah will further experience harm in the form of the accrual of unlawful presence and the threat of removal or, alternatively, a forced departure from the United States.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION—VIOLATION OF RIGHTS UNDER THE INA

57. The allegations contained in the preceding paragraphs are repeated and incorporated as though fully set forth herein.

58. Defendants have violated the Immigration and Nationality Act ("INA") with respect to Plaintiff by refusing to grant its H-1B visa petition and, thereby, denying Plaintiff's ability to benefit from the INA's specialty occupation provisions. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b).

59. USCIS has not satisfied any of the procedural requirements in its own regulations to permit a delay in adjudicating Plaintiff's application. *See* 8 C.F.R. § 103.2(b)(18) (specifying procedural requirements under which USCIS can withhold adjudication).

60. Congress has indicated that "processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571(b).

61. Despite the fact that Plaintiff's petition has been pending now for nearly two years, Defendants have failed to complete the processing of the application.

62. Defendants have further withheld approval of the petition without legal basis for nearly six months after concluding that Plaintiff is entitled to such approval.

63. Defendants have no legal basis to continue withholding approval of a petition once the AAO has rendered a decision requiring that approval.

64. Because of the continued denial, Plaintiff will be forced prior to February 14, 2019 to seek interim relief from this Court to preserve the status quo and permit Mr. Shah to continue living and working in the United States during the pendency of this Matter.

SECOND CAUSE OF ACTION—VIOLATIONS OF APA

65. The allegations contained in the preceding paragraphs are repeated and incorporated as though fully set forth herein.

66. The Government's refusal to grant Plaintiff's petition for an H-1B visa is improper and reviewable under the Administrative Procedure Act (APA). 5 U.S.C. § 702.

67. As a result of the Government's refusal to adjudicate the instant H-1B petition, Plaintiff is "suffering a legal wrong of agency action" and is "adversely affected or aggrieved by agency action," and therefore "is entitled to judicial review thereof." 5 U.S.C. § 702.

68. The Government's delay in granting Plaintiff's petition is unreasonable. The APA directs that the "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

69. Defendants lack any factual or legal basis for the continued delay with respect to Plaintiff's petition. As such, their actions are lacking in substantial evidence, are without rational basis, are arbitrary and capricious, and are an abuse of discretion. *See* 5 U.S.C. § 706.

THIRD CAUSE OF ACTION—MANDAMUS

70. The allegations contained in the preceding paragraphs are repeated and incorporated as though fully set forth herein.

71. Mandamus lies in the present action because Defendants owe Plaintiff a non-discretionary legal duty to adjudicate its H-1B petition within a reasonable period of time. *See* 8 U.S.C. 1101(a)(15)(H)(i)(B); 8 C.F.R. 103.2(b)(8)(i) ("If the evidence submitted with the application or petition establishes eligibility, USCIS ***will approve*** the application or petition[.]") (emphasis added).

72. The failure of the Government to grant Plaintiff's petition for nearly six months after Defendants' appellate unit concluded that Plaintiff is entitled to approval constitutes a violation of a duty owed to Plaintiff.

73. Plaintiff has repeatedly attempted to prompt action by Defendants in this matter, but Defendants have continued their unlawful delay.

74. Plaintiff has no other adequate remedy to address Defendants' failure to adjudicate its petition in a timely fashion.

75. The Court therefore has authority under the Mandamus Act, 28 U.S.C. § 1361, to compel the Government to approve Plaintiff's H-1B visa petition.

FOURTH CAUSE OF ACTION—DECLARATORY JUDGMENT ACT

76. The allegations contained in the preceding paragraphs are repeated and incorporated as though fully set forth herein.

77. Plaintiff is entitled to a declaration of its rights, which shall have the force and effect of a final judgment, in accordance with 28 U.S.C. § 2201(a).

PRAYER FOR RELIEF

Plaintiff hereby prays for relief as follows:

(1) That the Court grant immediate relief to preserve the status quo such that (a) Mr. Shah can continue working for Plaintiff and (b) Mr. Shah will not accrue unlawful presence or be forced to depart the country during the pendency of this matter;

(2) That the Court hold unlawful Defendants' delay in adjudicating Plaintiff's Form I-129;

(3) That the Court declare that Plaintiff is entitled to approval of its Form I-129 and that Defendants have unlawfully delayed issuing that approval;

(4) That the Court direct Defendants to grant Plaintiff's Form I-129 immediately;

(5) That the Court provide further relief as it deems appropriate, just, and equitable.

DATED January 15, 2019

Respectfully submitted,

/s/ Carl W. Hampe

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